
UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

DONALD CURTIS DECLUITT, §
§
Petitioner, §
§
versus § CIVIL ACTION NO. 1:04-CV-589
§
§
DIRECTOR, TDCJ-CID, §
§
Respondent. §

**MEMORANDUM ORDER OVERRULING OBJECTIONS AND ADOPTING
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Donald Curtis Decluitt, an inmate confined at the Hughes Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge has submitted a Report and Recommendation of United States Magistrate Judge concerning the petition. After concluding that certain of petitioner's grounds for review are procedurally barred and that all of his grounds for review are without merit, the magistrate judge recommends the petition be denied.

The court has received the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings, and all available evidence. Petitioner filed objections to the Report and Recommendation.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. After careful consideration, the court concludes the objections are without merit.¹

ORDER

Accordingly, petitioner's objections to the Report and Recommendation are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered denying the petition.

In addition, the court is of the opinion petitioner is not entitled to a certificate of appealability. An appeal from a judgment denying federal habeas relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253. The standard for a certificate of appealability requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004). To make a substantial showing, the petitioner need not establish that he would prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at

¹ As indicated above, the magistrate judge concluded that certain of petitioner's grounds for review were procedurally barred from review in this proceeding. In his objections, petitioner cites to where he raised some of these grounds in the documents he filed in state court. However, as the magistrate judge stated, in order to properly exhaust a ground for review, a petitioner must do more than merely mention the factual basis for the ground in state court. He must also alert the state courts to the constitutional nature of the ground for review. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). While petitioner described the factual basis for the grounds for review mentioned in his objections in state court, he did not state that the grounds for review were based on violations of the United States Constitution. As a result, petitioner did not properly exhaust these grounds for review in state court.

483-84. Any doubt regarding whether to grant a certificate of appealability should be resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), cert. denied, 531 U.S. 849 (2000).

In this case, the petitioner has not shown that the issues of whether his claims are meritorious or whether certain of his claims are procedurally barred are subject to debate among jurists of reason. The factual and legal questions raised by petitioner have been consistently resolved adversely to his position and the questions presented are not worthy of encouragement to proceed further. As a result, a certificate of appealability shall not issue in this matter.

SIGNED at Beaumont, Texas, this 11th day of May, 2012.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE